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ECONOMIC PLANNING IN THE LIGHT OF PUBLIC UTILITY REGULATION

IN THE midst of technological supremacy brought about by science and machinery, mankind has been overwhelmed by a great social disaster. The industrial machine does not seem to function. In spite of the ability of society to produce plenty for all, there is bitter poverty, unemployment and insecurity.

Voices in increasing number and insistence demand that the nation embark upon a policy of economic planning, looking to social control of industry, commerce and finance.¹ Some demand the setting up of a national economic council; others, the creation of national industrial syndicates or trusts; others, the organization of trade associations with power to limit and regulate production in accordance with estimated needs; and still others advocate the public ownership and operation of the basic industries of the country as indispensable to a planned economy in which periodic industrial depressions with their toll of human misery will be unknown.

If industry, commerce and finance remain privately owned and operated, then social control to be effective presupposes regulation in a very real sense. Since one of the objects sought to be attained is the balancing of production with consumption, and in that way regularize employment, there must, of necessity, be a power somewhere to limit or regulate production not to exceed the estimated demand; to ascertain by means of research and investigation what the need consists of; to prorate the needed output among the constituent business houses, and to prevent the entry into business of anyone without first obtaining a certificate of convenience and necessity, or its equivalent. That means the repeal of the Sherman Anti-trust Law and the setting up and the fostering of monopolies. It means the official death of the competitive system. But that also means that the American people would be exposed to oppressive charges,

¹ CHARLES A. BEARD, *AMERICA FACES THE FUTURE* (1932); *THE SWOPE PLAN*, edited by J. GEORGE FREDERICK (1931); Stuart Chase, *A Ten-Year Plan for America* (June 1931) HARPER'S MAGAZINE.

high prices and all the other abuses flowing from unbridled monopoly, unless effective regulation can be set up to fix prices and rates and to supervise the issuance of securities.

Is such regulation possible under our constitution? Has experience in public utility regulation furnished us with any light to guide us?

Whatever the difficulties, intelligent public opinion is agreed that profound social changes must be made to correspond to the needs and realities of our time. These will, of course, impose new strains upon government since it must assume new functions.

The American historian, Charles A. Beard, describes the situation thus:²

"Natural science and machinery have set a new and complex stage for the operations of government, imposed additional functions upon it, and lifted it to a new role in the process of civilization. No longer can it be correctly considered as a mere group of legal authorities set apart from private citizens to make and enforce simple rules of law. The election, terms, salaries, and duties of public officials—the staples of formal politics—are all incidents in a larger strategy. Even the most learned discussion of them throws little light on the social origins of government, the deeper causes of its form, policies, and tactics, or its place in the unfolding of national destiny and international relations. Philosophically surveyed, it appears as a product and organ of world movements; more than a collection of mechanical devices for getting work done in limited time and space."

The technological revolution has, undoubtedly, affected the theory and practice of government and its institutions. Of all the voices recognizing the need of, and calling for, readjustment, the lawyers' is the least audible. Yet the personnel of our government, in legislative, executive and judicial branches, as well as those in charge of the administrative

² CHARLES A. BEARD and WILLIAM BEARD, *AMERICAN LEVIATHAN*, p. 3 (Macmillan, 1930).

commissions, bureaus and departments, consists, in the main, of lawyers. Has the legal profession a contribution to make to the fashioning of the new governmental agencies? Is the law sufficiently elastic and alive to bridge the gap which, admittedly, exists between itself and social necessities? If law and government are to serve as stabilizers of civilization, they will have to be progressive and flexible. Sir Henry Main summed up this problem of the law, thus: ³

"Social interests and social opinion are always more or less in advance of law. We may come indefinitely near the closing gap between them, but it has a perpetual tendency to reopen. Law is stable. The societies we are speaking of are progressive. The greater or lesser happiness of a people depends on the degree of promptitude with which the gulf is narrowed."

Just as the great need of the eighteenth century was the forging of legal institutions to guarantee to the people *political* security and civil rights, so the great need of our time is the creation of legal institutions to give to our people *economic* security and social justice. The sociological concept of jurisprudence recognizes this. A. W. Spencer, former editor of *THE GREEN BOOK*, writing on *Sociology and the Law*, declared that it ⁴

"refuses to isolate the law from life in general and that it treats law not as an inflexible formula, to be expounded only by accomplished technicians, but also as a flexible social institution to be treated, like all other institutions, with regard to the utility of the end served and the nature of the function it seeks to fulfill. * * * With the sociological jurist the readjustment of the law to meet new social demands is not simply an actual tendency but a moral necessity. * * * Only through such adjustment can the law attain its highest efficiency. * * * The immediate result of the

³ ANCIENT LAW, c. II (Dutton, 1917).

⁴ *Sociology and the Law*, 2 MID-WEST Q. 61, 156.

new attitude will be an altered interpretation of current problems of social and economic legislation, and there must inevitably be a reaction against the time-worn precedents of the common law and a deliberate attempt to substitute new rules for old. This means that many of the highly individualistic conceptions which survive the common law, and are really anachronistic, being derived from doctrines long since abandoned, must yield to a modern ideal of social justice."

Writing in a similar vein, Supreme Court Justice Benjamin N. Cardozo says: ⁵

"Courts know today that statutes are to be viewed, not in isolation or *in vacuo*, as pronouncements of abstract principles for the guidance of an ideal community, but in the setting and the framework of present-day conditions as revealed by the labors of economists and students of the social sciences in our country and abroad."

To be useful to the movements seeking a new orientation in accordance with the social exigencies of our time, the lawyer must co-operate with the economists and students of the social sciences. In the present emergency, Mr. Justice Brandeis (with whom Mr. Justice Stone concurs) sounds the clarion call: ⁶

"The people of the United States are now confronted with an emergency more serious than war. Misery is widespread in a time not of scarcity but of overabundance. The long-continued depression has brought unprecedented unemployment, a catastrophic fall in commodity prices and a volume of economic losses which threatens our financial institutions. Some people believe that the existing conditions threaten even the stability of the capitalistic system.

⁵ THE NATURE OF THE JUDICIAL PROCESS (Yale Univ. Press, 1925) p. 81.

⁶ Dissenting opinion in *New State Ice Co. v. Liebmann*, — U. S. — (decided March 21, 1932).

"Economists are searching for the causes of this disorder and are re-examining the basis of our industrial structure. Business men are seeking possible remedies. Most of them realize that failure to distribute widely the profits of industry has been a prime cause of our present plight. But rightly or wrongly, many persons think that one of the major contributing causes has been unbridled competition.

"Increasingly doubt is expressed whether it is economically wise, or morally right, that men should be permitted to add to the producing facilities of an industry which is already suffering from overcapacity. In justification of that doubt, men point to the excess-capacity of our productive facilities resulting from their vast expansion without corresponding increase in the consumptive capacity of the people. They assert that through improved methods of manufacture, made possible by advances in science and invention and vast accumulation of capital, our industries had become capable of producing from 30 to 100 per cent more than was consumed even in days of vaunted prosperity; and that the present capacity will, for a long time, exceed the needs of business.

"All agree that irregularity in employment—the greatest of our evils—cannot be overcome unless production and consumption are more nearly balanced. Many insist there must be some form of economic control. There are plans for proration. There are proposals for stabilization.

"Some thoughtful men of wide experience insist that all projects for stabilization and proration must prove futile unless, in some way, the equivalent of the certificate of public convenience and necessity is made a prerequisite to embarking new capital in an industry in which the capacity already exceeds the production schedules.

"Whether that view is sound nobody knows. The objections to the proposal are obvious and grave. The remedy might bring evils worse than the present disease. The obstacles to success seem insuperable.

Economic and social sciences are largely uncharted seas. * * *

"To stay experimentation within the law in things social and economic is a grave responsibility. Denial of the right to such experimentation may be fraught with serious consequences to the nation. It is one of the happy incidents of the Federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This court has the power to stay such experimentation. We may strike down the statute embodying it on the ground that, in our opinion, it is arbitrary, capricious or unreasonable; for the due-process clause has been held applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this power we should ever be on guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold."

Mr. Justice Sutherland, writing for the majority, which declared the Oklahoma statute regulating the ice business unconstitutional, stated: ⁷

"Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistent with the Fourteenth Amendment. Under that Amendment, nothing is more clearly settled than that it is beyond the power of a state, 'Under the guise of protecting the public, arbitrarily [to] interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.'"

The concept underlying this decision is that of a system of production, based on free competition. Of course, the inevitable march of events will compel American jurispru-

⁷ *Ibid.* — U. S. —.

dence to abandon this concept and follow the more realistic views set forth in the opinion of the dissenting Judges. In an age of great concentration of wealth production and billion-dollar mergers, there may be competition of a sort, but, as a prevailing system, it has been relegated to history.

The advocates of social control, through regulation, must first cross the legal bridge set up by the view of the majority of the court in the *New State Ice Co.* case. Assuming, however, that a legislative program for such control is properly presented to the court and it holds, as it very likely will, that the basic industries, commerce and finance are affected with a "public use," then what? It means that regulation will be lawful.

But the legal and economic student must go further than merely remove the Law's obstruction to regulation. There is a creative and constructive side which lays claim upon him. He must enquire, is regulation effective? Does our experience with regulation, where it has been tried in the public utility field, warrant its extension to the whole of industry? Can it meet the hopes and expectations of a nation groping for a solution of its economic and social ills? All of these questions need a candid answer if we are, indeed, to make progress instead of merely inviting change. Though desirous to leave the community free to experiment, to solve its problems by the scientific "process of trial and error," Mr. Justice Brandeis, himself, is none too sanguine about regulation. For, he declares:⁸

"We have been none too successful in the modest essays in economic control already entered upon. The new proposal involves a vast extension of the area of control. Merely to acquire the knowledge required as a basis for the exercise of this multitude of judgments would be a formidable task."

Judge Brandeis, undoubtedly, referred to public utility regulation when he said that "we have been none too successful" in the economic control already entered upon. It

⁸ *Ibid.* dissenting opinion in *New State Ice Company of Oklahoma v. Liebmann*, — U. S. —.

should be borne in mind that the utility business affords a favorable field for regulation. If it was none too successful here, is there any hope for its success in the vastly larger and more complex field of business and commerce generally? A brief review of public utility regulation and its problems will now be helpful.

Public utilities may be defined as the business of selling commodities or furnishing services vitally necessary to public health, comfort and convenience. Under privileges specially conferred, they operate as monopolies and are endowed with sovereign powers such as the right of eminent domain. Following the doctrine long established in regard to railroads, the furnishing of public utility services such as communication, light, heat, power and water, has come to be treated as public business. The companies are exercising a public function and are, supposedly, the agents of the State. What these companies mean in terms of cost to the American people has been emphatically stated in the report to the New York Legislature by its Commission on Revision of the Public Service Commission Law:⁹

“When it is considered that the total annual income of the public utilities in the country approximates \$10,000,000,000, the necessity of subjecting the methods whereby such earnings are determined to the most careful criticism and review, is obvious. This is a matter of national concern.”

The utility companies have been granted monopoly rights by which they levy an annual toll on the American people over three times as large as that collected by the United States every year to carry on the national government. It amounts to an annual tax of a little over \$400 on every family.

Regulation may be defined as an effort by the State and nation, through the establishment of commissions, to super-

⁹ Majority report, p. 51; Report of William J. Donovan, Counsel, p. 90 (1930).

vise and control the operation of the utility companies so as to secure to the public adequate services and reasonable charges. Wisconsin was the first state to establish, in 1907, a permanent, presumably expert, regulation commission. New York followed the same year. At the present time, every state but one has a regulation commission. The Federal government has its own regulatory machinery.

After twenty-three years of experience with systematic regulation by the Public Service Commission, New York State created a commission charged with the duty of "ascertaining whether the Public Service Commission Law * * * accomplishes the objects for which the system of state regulation was established." The minority report submitted to the Legislature states this basic finding:¹⁰

"On the basis of this intensive investigation, we find that effective public utility regulation in the state of New York has broken down and that the consumers of the state have been abandoned to the exploitation of the public utility companies without any effective restraint by the Public Service Commission."

In another place, the Commissioners add the warning or the threat, that¹¹

"Unless effective regulation can be restored, there is bound to be a rapid shift of public opinion in favor of public ownership and operation."

The majority of the Commission, through its counsel, reported to the Legislature the same conclusion in somewhat more cautious language, by saying:¹²

"Leaders of utilities must look upon themselves as economic servants of the public, as the State officials are the political servants of the public. If this

¹⁰ Minority report, p. 23; Report of Commissioners Walsh, Bonbright and Adie, p. 258.

¹¹ *Ibid.* p. 1; *ibid.* p. 245.

¹² Majority report, p. 13; Report of William J. Donovan, Counsel, p. 66.

is only an Utopian idea, then, in my judgment, regulation is impossible. The alternative is not coercion, because that can only bring resort to the courts with resultant resentment and bitterness. The only feasible alternative is public ownership * * *

According to this view, the State is helpless unless the Utility Leaders are willing to regard themselves as public servants. What if they do not? And why should they be expected to, any more than we expect the leaders of other private business to act as "servants of the public." After all, their motive for being in the utility business is the private profit they make out of it. We are told that legal coercion is useless because the companies will "resort to the courts." But why should their resort to the courts prevent state coercion, if that becomes necessary in the public interest to secure adequate service at reasonable rates?

The answer lies in a series of Supreme Court decisions beginning with the *Minnesota Rate* case, in 1890.¹³ The courts' view of the meaning of the terms "property" and "liberty" as used in the Constitution of the United States has undergone revolutionary changes since the *Slaughterhouse* cases, in 1872.¹⁴ The courts' construction of the Fifth and Fourteenth Amendments profoundly influenced the economic history of the country.

The Fifth Amendment, adopted in 1791, is applicable to the Federal Government. It provides that no person shall be "deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation." The Fourteenth Amendment, adopted in 1868, is applicable to state governments. It provides:

"Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

¹³ *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 418 (1889).

¹⁴ *Slaughterhouse cases*, 16 Wall. 36, 83 U. S. 36 (1872).

In 1872, the Supreme Court of the United States was called upon to decide the constitutionality of a Louisiana State statute granting to a corporation a monopoly to maintain slaughter-houses and regulating the rates to be charged to butchers dealing with the corporation.¹⁵ The Court divided. The majority held the statute constitutional. The prevailing opinion, written by Mr. Justice Miller, contended that the statute did not deprive the complainants of "property" or "liberty" in the sense used in the Thirteenth and Fourteenth Amendments. The word "liberty" should be construed with reference to the purposes of the amendments, which were to free the colored people from slavery, said the Court. Before the amendments, the liberty of citizens was in the keeping of the states. The amendments did not serve to transfer to the Federal Government the protection of all liberty. They only transferred from the states that fraction of liberty which is comprehended in the freedom from personal slavery.

The word "property" as used in the Fourteenth Amendment had the meaning given to that term by the common law, namely, physical things held by the owner; something tangible.

"Under no construction of that provision that we have ever seen," declared the Court, "can the restraint imposed by the state of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision."¹⁶

Contrast this with the decision in the *New State Ice Co.* case, decided by the same Court on March 22, 1932. One can see at a glance the profound change in American Jurisprudence wrought in the last sixty years.

The minority opinion in the *Slaughter-house* cases foreshadowed the law as it is today. Justice Bradley, in one of the minority opinions, wrote that:

"The right to choose one's calling is an essential part of that liberty which it is the object of govern-

¹⁵ *Ibid.*

¹⁶ *Ibid.* at pp. 69, 73.

ment to protect; and a calling, when chosen, is a man's property and right. * * * The right of choice is a portion of their property." ¹⁷

No authorities were cited by the minority to sustain their definition of the terms "property" or "liberty." Twelve years later, in 1884, in the second *Slaughter-house* case,¹⁸ Justice Field, of the minority in the first cases, now suggested ¹⁹ the source of their new definition as being that of Adam Smith, who had said: ²⁰

"The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable."

Thus, the definition of the term "property" in its present constitutional sense which gradually crept into the state and Federal decisions, and is now settled law, is not to be found in the Constitution itself at all, but is the result of the Supreme Court's translation into law of Adam Smith's economic concepts of property.

The decision, in 1876, in *Munn v. Illinois*,²¹ is usually regarded as "the beginning of the present era of public control." But, in that case, the Court's conception of "property" was not that of the later cases, beginning in the Nineties.

The case of *Munn v. Illinois* involved a statute enacted by the Legislature of the state of Illinois, regulating the charges for services by grain elevators. Attacked as unconstitutional because it deprived the owners of their property without "due process of law," the United States Supreme Court, conformable to its *Slaughter-house* decision, four years earlier, upheld the statute on the ground that it did not deprive the owners of property in the sense in which that term is used in the Fourteenth Amendment, and, therefore, was not subject to restraint by the Federal courts. The state

¹⁷ *Ibid.* at pp. 116, 122.

¹⁸ *Butchers Union Co. v. Crescent Suit Co.*, 111 U. S. 746, 4 Sup. Ct. 652 (1883).

¹⁹ *Ibid.* at p. 757.

²⁰ 1 SMITH, *WEALTH OF NATIONS* (Cannan ed., 1904) V. 1, p. 123.

²¹ 94 U. S. 113 (1876).

of Illinois was merely regulating the "use and enjoyment" of the property, and that was a proper exercise of the police power.

The minority again dissented. Justice Field for the minority, answering the state court, which held the statute good because no property was "taken" from the owners since they were not deprived of "title and possession," said: ²²

"There is indeed no protection of any value under the constitutional provision which does not extend to the use and income of the property, as well as to its title and possession."

But the Constitution never restrained legislative action affecting the "use and income of property." It only refers to "property," and that term, at the time of the adoption of the Amendment, had the common-law meaning of physical things held by the owner. Only by reading into the Constitution after the word "property," the words "*or the use and income thereof*," can the minority view and the present decisions be explained.

Fourteen years after the *Munn* case, in 1890, in the *Minnesota Rate* case,²³ wherein the railroads objected to a Minnesota statute, fixing rates, the Court adopted the views of the minority in the *Munn* case, with respect to the meaning of the term "property." Writing the prevailing opinion, Justice Blatchford said:

"This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation." ²⁴

What constitutes a reasonable rate and when such a rate amounts to "confiscation" is declared to be "eminently a question for judicial investigation, requiring due process of law for its determination." ²⁵

Thus the courts' transformation of the constitutional concept of property from being physical things, objects of

²² *Ibid.* at p. 143.

²³ *Supra* note 13.

²⁴ *Ibid.* at p. 456.

²⁵ *Ibid.* at p. 458.

the owner's private use in the sense of "having title and possession" to the thing itself into a concept of intangible and incorporeal property arising from the right to the "use and income" of such property, had become complete with the *Minnesota Rate* case. The judiciary now became the arbiter of how far the states may go in their regulation. If they "take" too much, amounting to "confiscation," the courts will step in.

From this there is only one short step to the celebrated case of *Smythe v. Ames*,²⁶ decided in 1897. In the midst of the severe economic depression of that time, the state of Nebraska sought to relieve its people from the exorbitant freight charges made by the railroads, by fixing lower rates. Stockholders of railroads affected filed suits to restrain the State and the companies from promulgating the prescribed freight schedules on the ground that the statute limiting the rates is violative of the Fourteenth Amendment. Was the legislative act a "taking" of property without due process of law? That involved the determination of whether the prescribed rates would yield such a return on the railroad's properties as would afford them protection in the "use and income" of their properties. What must such a return be? And upon what "value" shall it be based? The stockholders contended that the infallible rule for determining value was the outstanding securities, the stocks and bonds of the railroads; and that the return must be sufficient to pay all expenses, carrying charges, obligations, interest on bonds and dividends on stock. The public representatives objected. The roads were over-capitalized. The securities were heavily watered. As a result of the severe depression that was a time of low and declining prices. William Jennings Bryan, appearing as one of counsel for the State, argued vigorously that the sound rule for determining value is the cost of reproduction of the properties.

Admitting that the questions presented were "embarrassing" since they involved issues more concerned with economics than with law, the Court nevertheless sustained the stockholders and declared the law unconstitutional. It

²⁶ 169 U. S. 466, 18 Sup. Ct. 418 (1897).

held that the railroads were entitled to a fair return on the "fair value of the property,"²⁷ and, in determining such value, consideration should be given to the following six factors:²⁸

(1) " * * * the original cost of construction," (2) "the amount expended in permanent improvements," (3) "the amount and market value of its bonds and stocks," (4) "the present as compared with the original cost of construction," (5) "the probable earning capacity of the company under particular rates prescribed by statute," (6) "and the sum required to pay operating expenses * * * and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return on the value of that which it employs for the public convenience."

Thus, no formula is set up by which value for rate-making purposes can be determined with certainty. Each of the six factors above enumerated is "to be given such weight as may be just and right in each case." As if these were not indefinite enough, the Court added that there may be "other matters to be regarded in estimating the value of the property."

The decision was followed consistently and its principles reaffirmed in the famous *O'Fallon* case,²⁹ in which the Court, (three members dissenting) held that the Interstate Commerce Commission failed to give "*due consideration to all the elements of value recognized by the law of the land for rate-making purposes.*"

In this connection it is important to remember two propositions: First, that valuation must be determined on the basis of conditions existing *at the time under investiga-*

²⁷ *Ibid.* at pp. 489, 490.

²⁸ *Ibid.* at p. 547.

²⁹ *St. Louis and O'Fallon R. R. Co. v. U. S.*, 279 U. S. 461, 49 Sup. Ct. 384 (1928).

tion, not on the basis of costs in the past. It is the "present value" that counts.

Second, that the "law of the land" applicable to valuation of utility property has been held to be a constitutional question. It does not rest upon legislative foundations and, therefore, cannot be changed by statute.

In the second *Minnesota Rate* cases, decided in 1912, Mr. Justice Hughes, writing for the Court, stated:³⁰

"It is clear that in ascertaining the present value we are not limited to the consideration of the amount of the actual investment. If that has been reckless or improvident, losses may be sustained which the community does not underwrite. As the company may not be protected in its actual investment, if the value of its property be plainly less, so the making of a just return for the use of the property involves the recognition of its fair value if it be more than its cost. The property is held in private ownership and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law."

Dr. John Bauer, appearing frequently for the public in rate controversies, advocate of the "prudent investment" theory for ascertaining value as a means of making regulation effective, seeks to explain³¹ away the courts' declaration that "the property is held in private ownership and it is that property, and not the original cost of it of which the owner may not be deprived without due process of law." He asks:

"But why conclude that Justice Hughes meant actually to apply the condemnation idea, and thus do violence to other underlying conceptions of public utility relations recognized by the Court since the time of *Munn v. Illinois* in 1876?"

The answer is that the "underlying conception of public utility relations" recognized by the majority in *Munn v.*

³⁰ 230 U. S. 352, 33 Sup. Ct. 729 (1912).

³¹ JOHN BAUER, *EFFECTIVE REGULATION OF PUBLIC UTILITIES*, pp. 87-88 (Macmillan, 1925).

Illinois have been definitely abandoned by the Court as far back as the first *Minnesota Rate* case.³² And ever since that case the Court adhered to its new interpretation of the meaning of the term "property" as used in the Fifth and Fourteenth Amendments. Because of this, valuation for rate-making purposes has become a mere guess, and regulation a practical impossibility. The New York Commission on Revision of the Public Service Commission Law, reporting to the Legislature in 1930, summed up this phase of the problem in these words:³³

"There is no problem * * * more complex and about which opinion is more at variance, than the problem of valuation. Upon its proper solution greatly depends the future of public utility management. The Supreme Court in its various decisions has built up a policy for determining values that has resulted in a variety of interpretations. This has resulted too frequently in failure to adopt a consistent policy of rate control. The testimony in these proceedings shows that in New York State in the absence of such a policy each case must be handled for itself. * * * Where valuations have been made and a rate base determined, rate regulation becomes in large part a matter of arithmetic, but without it such regulation is at best an approximate guess."

And the minority report of the same Commission makes this emphatic declaration:³⁴

"We must assert at the start our conviction that the unlimited power of utility companies to resort to the Court in all rate cases means inevitably failure of effective regulation."

Professor Felix Frankfurter sums up what he declares to be the "heart of the defect" in regulation thus:³⁵

³² *Supra* note 13.

³³ Majority Report, at pp. 50-51; Report of William J. Donovan, Counsel, p. 90.

³⁴ Minority Report, at p. 31; Report of Commissioners Walsh, Bonbright and Adie, p. 262.

³⁵ FELIX FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT*, p. 101 (Yale University Press, 1930).

"The heart of the difficulty is the current judicial approach to utility valuation. Out of the constitutional provision safeguarding property against deprivation 'without due process of law,' the Supreme Court has evolved a doctrine that a utility is entitled to a fair return on its present 'value,' and 'value' must be ascertained by giving weight, among other things, to estimates of what it would cost to reproduce the property at the time of the rate hearing. The Supreme Court has not given us a calculus of present value, and it has left in conscious obscurity the amount of weight to be given to reproduction cost. Some of its language has, however, induced commissions and lower courts to find that controlling effect should be given to such cost."

In the practical administration of the problem, by the time a rate base is determined, after an extensive and costly proceeding, either before the Commission or the Court, or both, it loses its validity because of the variable factors involved. A conspicuous example is the *Telephone Company* case. Since 1919 to date, the valuation of the properties of the New York Telephone Company has been before the Public Service Commission of New York, in the Federal Courts, back before the Commission—but no determination has yet been made; the public in the meantime pays such rates as are fixed or acquiesced in by the company. By the time a hearing was completed, the findings became out of date.

"To the valuation of the property of the *New York Telephone Company* case," declares the New York Legislative Commission,³⁶ "the Public Service Commission devoted more than three years. More than 25,000 pages of testimony was collected in formal hearings. Following petitions in equity seeking to enjoin the enforcement of the rates so fixed, the Federal Court appointed a master in equity who proceeded to revalue the property. He conducted 710 hearings at which 609 witnesses gave testimony

³⁶ *Supra* note 33 at pp. 155, 156; *supra* note 33 at p. 155.

amounting to over 36,000 pages. 3,288 exhibits were presented, several of them consisting of more than one volume and one exhibit filling several volumes. The time necessary for this revaluation exceeded four years."

The companies, as well as the public, have learned from experience that the former do not fare badly in the Federal Courts. The New York Investigating Commission found that:³⁷

"During the period of the present Public Service Commission of New York, special masters have on nine occasions been appointed by federal statutory courts to determine the valuation of utility property. In each of these investigations the master found the schedule of charges fixed by public authority to be insufficient to yield a fair return upon the fair value of the property. In eight of these cases the Court issued a permanent injunction restraining the Public Service Commission from enforcing the rates on the ground that for the Commission so to do would deprive the utility corporation of its property without due process of law. In each of these eight cases the schedule of charges in question was fixed not by the Commission but by a statute. In the ninth case, an action by the New York Telephone Company to enjoin the enforcement of rates fixed by the Commission, the master reported that the rates were confiscatory. The final determination by the Court while not completely endorsing the finding of the master, permanently enjoined the enforcement of the rates fixed by the Commission on the ground that they were confiscatory."

The report adds:³⁸

"The state should not be required to surrender to the judges of the national courts so essential a key to the welfare of its people."

³⁷ *Ibid.* at p. 155; *ibid.* at p. 154.

³⁸ *Ibid.* at p. 156; *ibid.* at p. 155.

It is not the purpose of this article to present an exhaustive analysis of the law governing public utility regulation, nor to discuss all the obstacles and difficulties involved. It is intended merely to show how the underlying legal principles laid down by our courts affecting regulation of prices and rates to be charged to consumers by the already recognized monopolies — the utility companies — make effective regulation impossible, and its extension to the broader and more complicated field of business, as a whole, socially undesirable.

Social control, looking to a planned economy, cannot rely upon regulation. In the case of utilities, both reports to the New York Legislature by its Commission, as we have already seen, state that *the alternative to the failure of regulation is public ownership and operation*. [Ed.—Italics ours.] Joseph B. Eastman, a former member of the Massachusetts Public Service Commission and, since 1919, a member of the Interstate Commerce Commission, sets forth his views, “the product of twenty-five years’ observation of and experience with Public Utilities,” as follows:³⁹

“It is still a custom to brand the idea of public ownership and operation as ‘socialistic,’ and dismiss it with that brand as opposed to what has been called rugged American individualism. But this is use of words to paralyze rather than promote thought. As a matter of fact our individualism has always been tempered to a considerable degree with socialism, and the tendency has been to increase that degree. We have found that certain activities can best be carried on by the government for the common good, instead of being left to private enterprise. Illustrations, which could be multiplied, are parks, highways and bridges, schools, fire protection, postal service, and water supply. All these could be, have been, or to some extent

³⁹ Joseph B. Eastman, *A Plan for Public Ownership and Operation* (January, 1932) 159 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, pt. I, at p. 112.

still are, carried on by private enterprises. We have found that these activities and numerous others can with advantage be socialized, and in that form they now have their place among accepted American institutions. In such instances government has superseded, or at least invaded, the domain of business. There may be those who shudder at the thought, but certainly they are not conspicuous.

"Granting, therefore, that the public ownership and operation of public utilities is socialistic, the question presented is not one to be settled by the bandying of epithets or phrases, but is the intensely practical question of whether these particular activities are of such a kind that they can with general advantage be socialized, in whole or in part, like many others which have already undergone that change."

Paradoxically enough, the "law of the land" which so severely hampers regulation, does not interfere with the public going into business directly through agencies of their choice.

In 1919, the state of North Dakota enacted a legislative program which provided that the State engage in the business of manufacturing and marketing farm products, of providing homes for the people, of owning and operating utilities, of establishing a system of warehouses, elevators, flour mills, factories, plants, machinery and equipment. An Industrial Commission was created to be in general control of these enterprises; and provision was made for the pledging of state credit and for the issuance of bonds to finance the projects.

Green, a taxpayer, attacked this legislation as unconstitutional. By unanimous decision, the United States Supreme Court rejected Green's plea and sustained the legislation.⁴⁰ Though reaffirming the rule that "it has come to be settled that the authority of the states to tax does not include the right to impose taxes for merely private purposes,"⁴¹ the Court held:⁴²

⁴⁰ *Green v. Frazer*, 253 U. S. 233, 40 Sup. Ct. 499 (1920).

⁴¹ *Ibid.* at p. 238.

⁴² *Ibid.* at p. 242.

"The precise question herein involved, so far as we have been able to discover, has never been presented to this Court. The nearest approach to it is found in *Jones v. City of Portland*, 245 U. S. 217, in which we held that an act of the state of Maine authorizing cities or towns to establish and maintain wood, coal and fuel yards for the purpose of selling these necessities to the inhabitants of cities and towns, did not deprive taxpayers of due process of law within the meaning of the Fourteenth Amendment. In that case we reiterated the attitude of the Court towards state legislation, and repeating what had been said before, that what was or was not a public use was a question concerning which local authority, legislative and judicial, had special means of securing information to enable them to form a judgment; * * *.

"In many instances states and municipalities have in late years seen fit to enter upon projects to promote the public welfare which in the past have been considered entirely within the domain of private enterprise."

The economic facts with regard to social control through public ownership and operation are outside the scope of this article. The literature on the subject is rich and available to all with eyes to see. Irrespective of what thoughtful people may think of one plan or another, this is certain: we are living in a time of swiftly moving events, which may sweep many things before us. The human institutions we know are changing under our very eyes, and the great problem is to make the change constructive and for the good of the greatest number. The legal profession will do well to harken to the eloquent words with which Justice Brandeis concludes his dissenting opinion in the *New State Ice Company* case: "If we would guide by the light of reason, we must let our minds be bold."

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New York City.

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